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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~357.~~ 127

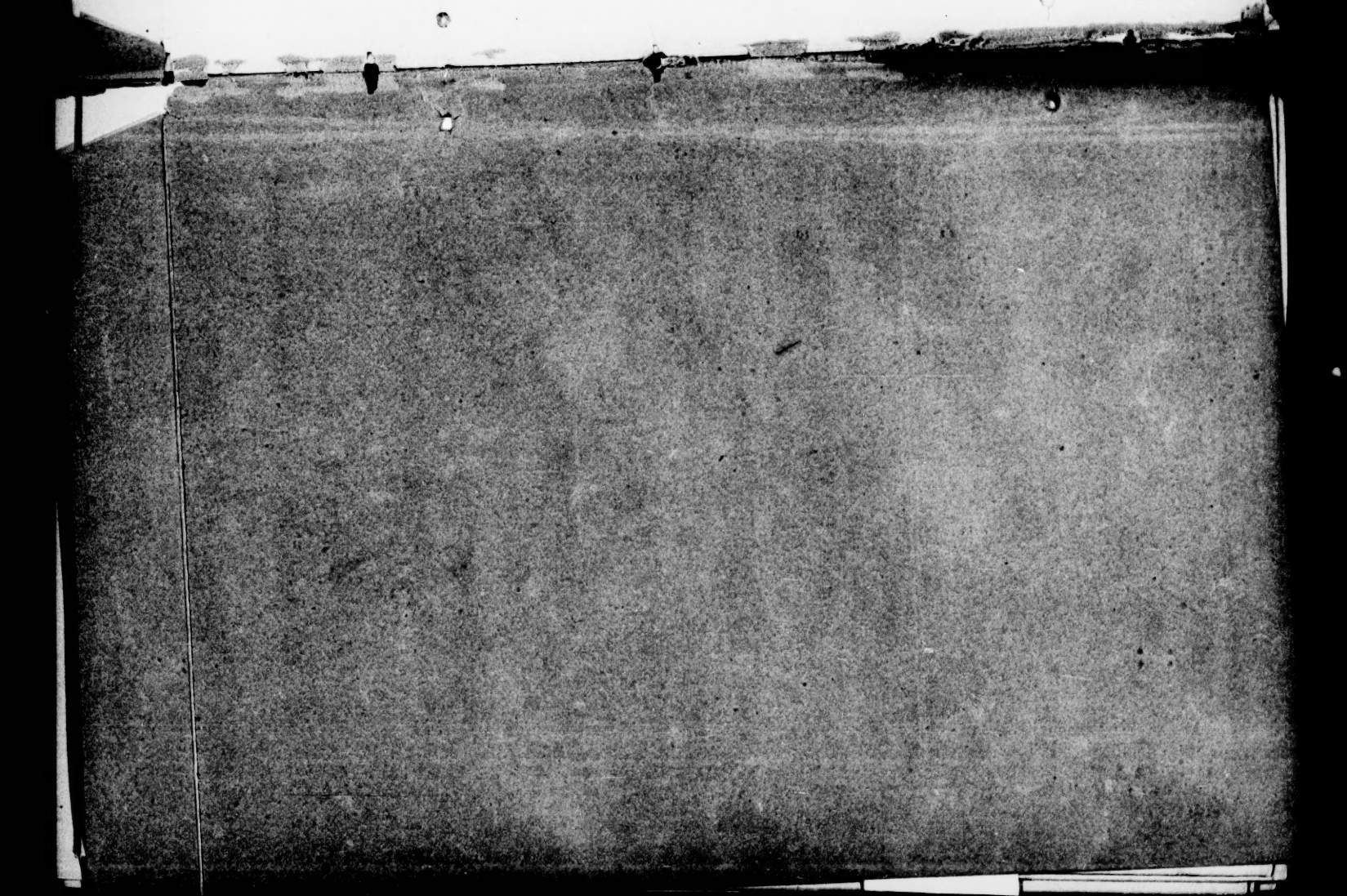
RICHARD C. GREENLEAF, HENRY WOODS, SAMUEL JOHNSON, JR., WILLIAM ENDICOTT, JR., THOMAS MACK, AND AUGUSTUS DE PEYSTER, COPARTNERS, AS C. F. HOVEY & CO., PLAINTIFFS IN ERROR,

vs.

JOHN Z. GOODRICH, LATE COLLECTOR OF CUSTOMS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED MARCH 31, 1877.



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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Richard Greenleaf, Henry Woods, Samuel Johnson, jr., William Endicott, jr., Thomas Mack, and Augustus De Peyster, all of Boston, in the Commonwealth of Massachusetts, merchants and co-partners under the firm and style of C. F. Hovey & Company, plaintiffs, and John Z. Goodrich, formerly collector of customs for the district of Boston and Charlestown, defendant, in a plea of the case, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the first day of December, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—

NATHAN CLIFFORD,
Associate Jus. Sup. Court U. S.

2 Circuit court of the United States, district of Massachusetts, ss:

And now, here, the judges of the circuit court of the United States, in and for the district of Massachusetts, make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, John G. Stetson, clerk of said circuit court of the United States, in and for the district of Massachusetts, have hereto set my hand andthe seal of said court this eighth day of December, A. D. 1876.

[SEAL.] JOHN G. STETSON, *Clerk.*

(Indorsed:) Greenleaf et al. v. Goodrich. Writ of error.

REC. 357—1

3 The United States of America to John Z. Goodrich, formerly collector of customs for the district of Boston and Charlestown, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States within and for the district of Massachusetts, wherein Richard Greenleaf, Henry Woods, Samuel Johnson, jr., William Endicott, jr., Thomas Mack, and Augustus De Peyster, all of Boston, in said district, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Nathan Clifford, associate justice of the Supreme Court of the United States, this first day of December, in the year of our Lord one thousand eight hundred and seventy-six.

NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.

Sufficient service of this citation is hereby acknowledged.

GEORGE P. SANGER,
U. S. Att'y for Def't in Error.

(Indorsed:) Greenleaf et al. v. Goodrich. Citation.

4 UNITED STATES OF AMERICA.
Massachusetts District, ss:

At a circuit court of the United States for the first circuit begun and holden at Boston, within and for the district of Massachusetts, on Friday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and seventy five.

Before the honorable George F. Shepley, circuit judge.

RICHARD C. GREENLEAF, HENRY WOODS, Samuel Johnson, jr., William Endicott, jr., Thomas Mack, and Augustus De Peyster, all of Boston, in the Commonwealth of Massachusetts, merchants and co-partners under the firm and style of C. F. Hovey and Company, plaintiffs,

v.

JOHN Z. GOODRICH, COMMORANT OF BOSTON, a citizen of said commonwealth, and of
5 the United States of America and late collector of the customs for the district of Boston and Charlestown, defendant.

In a plea of the case, for that heretofore, to wit, on the ninth day of May, in the year of our Lord one thousand eight hundred and sixty-three, the said defendant being indebted to the plaintiffs in the sum of four thousand dollars demanded and recovered of the plaintiffs by the defendant under color of a law of the United States for the collection of

duties (and by the plaintiffs paid under protest) and before that time had and received by the defendant to the use of the plaintiffs, promised to pay the same when he should be thereto afterwards requested, yet he hath not paid the same nor any part thereof; and in the same amount for money paid by the plaintiffs for the use of the defendant at his request; and in the same amount for money due from the defendant to the plaintiffs for interest of money before then due and owing from the defendant to the plaintiffs, and by the plaintiffs forborne to the defendant at the defendant's request, for a long time before
6 then elapsed; and in the further sum of four thousand dollars and cents according to the account annexed: in consideration thereof promised to pay the same to the plaintiff on demand; yet he has not paid the same, to the damage of the said plaintiffs, as they say, the sum of four thousand dollars.

The writ in this cause is dated the ninth day of May, A. D. 1863, and was entered at the October term of this court, A. D. 1863, when and where the parties appeared by their respective attorneys, and thence the cause was continued from term to term to the October term, A. D. 1874, when the plaintiff filed a bill of particulars.

This cause was thence continued to the May term, A. D. 1875, when, on the eighth day of June, the following answer was filed, namely:

And now comes the said defendant and for answer to the plaintiffs' writ and declaration denies each and every allegation in each and every count thereof; whereof he puts himself upon the country.

By his att'y GEORGE P. SANGER,
United States Attorney.

7 Issue being thus joined, the cause after a full hearing, the honorable Edward Fox, district judge of the United States for the district of Maine, duly assigned by the honorable George F. Shepley, circuit judge, to hold said circuit court, sitting and holding said court, is committed to a jury sworn to try the issue, who after hearing all matters and things concerning the same return their verdict therein, and upon oath say: "The jury find for the defendant." On the eighteenth day of June, the following motion for new trial was filed, namely: And now after verdict and before judgment the plaintiffs in the above action move that the verdict may be set aside and a new trial granted because,

1st. The verdict is against the evidence and the weight of evidence.

2nd. The verdict is contrary to the instructions of the court.

3rd. The court erred in admitting the evidence and testimony of Webster respecting samples lettered L, Z, Z', J, K, C, B, I, W.

4th. The instructions of the court erroneously led the jury to infer
8 that a sufficient similarity under the statute would be established between the pl'ffs' goods and d'laines, by proof of the fact that both were of "mixed materials" or were "manufactured wholly or in part of wool" or of "worsted," and that such similarity in any one of said respects would of itself carry the plaintiffs' goods into the delaine clause.

5th. The court erred in not giving the jury any legal test of "similar description," and erred in allowing the jury *the jury* to find as a fact what similarity existed between the pl'ffs' goods and delaines, and also as matter of law, what similarity the law required.

6th. The court should have defined what the statute meant by goods

of "similar description," and should have submitted to the jury the issue whether the goods in question came within the court's definition.

7th. The court misled the jury by granting the defendant's eleventh prayer for instructions and omitting to define what characteristics in delaines were to be the criterion.

8th. The court erred in stating that adaptation to the same uses created a sufficient similarity between pl'ffs' goods and delaines.

9th. The court erred in excluding evidence that the pl'ffs' goods
9 were not similar to delaines in a commercial or a manufacturing sense, and also in not expounding to the jury the bearing and effect of the dissimilarities between the pl'ffs' goods and delaines of which the pl'ffs had put in evidence in limiting and controlling the scope of the clause "goods of similar description" in connection with the statutes in force in 1872.

CHARLES LEVI WOODBURY,
Att'y for Plaintiffs.

F. W. HURD,
Att'y for Pl'ffs.

Which motion, on the twenty-fifth day of September, was overruled by the court.

This cause was thence continued to this present term, and now, to wit, May 13th, A. D. 1876, it is considered by the court, the honorable John Lowell, district judge, sitting, that the plaintiffs take nothing by their said writ, and that the said John Z. Goodrich, defendant, recover of the said Richard C. Greenleaf, Henry Woods, Samuel Johnson, jr., William Endicott, jr., Thomas Mack, and Augustus De Peyster
10 plaintiffs, his costs of suit taxed at dollars and cents.

Upon the trial of the said cause, after the evidence was closed on both sides and before the issue was submitted to the jury, the said plaintiffs filed their bill of exceptions which was sealed and allowed by the honorable Edward Fox, district judge of the United States for the district of Maine, duly assigned to hold said circuit court as aforesaid, and is in words and figures following, namely :

Bill of exceptions.

This was an action of assumpsit to recover back monies had and received by the defendant as collector of the port of Boston assessed as duties upon goods imported by the plaintiffs into the port of Boston in the years 1862 and '3. The pleadings are made a part of this bill of exceptions. The defendant assessed and exacted duties at the rate of thirty per cent. advalorem and in addition two cents per square yard upon the ground that these goods were goods of similar descrition
11 to delaines within the ninth section of the act of July 14th, 1862, and did not exceed in value 40 cents per square yard. Plaintiffs duly protested against the exaction of the two cents per square yard and claimed that the goods were only liable to a duty of thirty per cent. ad valorem under the mixed material clause in the act of March 2nd, 1861, and five per cent. ad valorem in addition under the similar clause in the act of July 14th, 1862, and appealed to the Secretary of the Treasury, who affirmed the decision and action of the collector. And this action was duly instituted for the recovery of the difference between thirty-five per cent. ad valorem and thirty per cent. ad valorem and two cents per square yard. A copy of the protest is hereby annexed and made a part of this bill of exceptions. It appeared in evidence that all delaines,

cashmere delaines, muslin delaines and barège delaines were woven in the gray or natural color of the wool or worsted and cotton, and afterwards dyed or printed, and were imported and bought and sold in both conditions, and that they were afterwards used for ladies' dresses.

12 It also appeared in evidence that there were other goods, such as challis delaines, persian delaines, coburgs and amures which were woven and bought and sold in the gray or natural color of the wool, worsted, or cotton, as well as after being dyed or printed, and afterwards used for ladies' dresses. It also appeared in evidence that some delaines and muslin delaines were all wool or worsted while other and cashmere delaines barège delaines, challis delaines, persian delaines, coburgs, armures, &c., were made of cotton warp and wool or worsted filling.

It also appeared in evidence that delaines, muslin delaines, barège delaines, &c., were known by the same names when bought and sold in the gray or uncolored condition as when bought and sold in a printed or colored condition.

It further appeared in evidence that as early as 1857, both the all wool delaines and those with cotton warp and wool or worsted filling were known in trade, the better class by the above names, which from time to time were changed to suit the fancy of importers and purchasers.

13 It further appeared in evidence that the 'plaintiffs' good' in question were known in trade and among manufacturers and bought and sold as Poil de Chévres, Reps, Plaids, Lustres, Saxony dress goods, &c., and were never woven in the gray or natural color of the wool or worsted or cotton, but were always woven in colors by the yarns being dyed or colored before weaving, and that they never existed in a gray or uncolored condition.

It further appeared in evidence that the machinery used in the manufacture of the various kinds of delaines could not be used without some alterations in the manufacture of the plaintiffs' goods when they were of more than one color, and that the machinery by which the designs were printed on delaines were not used at all in the manufacture of Saxony dress goods, the designs and surfaces of the latter being made by the art of weaving colored yarns into a fabric.

It also appeared in evidence that in England the printing or dyeing of delaines was always done at print works and at a different manufactory after the goods had left the weavers.

14 There was also evidence tending to show that the plaintiffs' goods in question were usually of greater value than delaines, delaines varying in price from 12 to 25 cents, and Saxony dress goods varying from 14 to 35 cents per yard, and also to show that they presented a different appearance to the eye both in piece and when made up, and were of greater weight.

It was also shown in evidence that goods alike with those of plaintiffs in question were classified by the customs officers under the act of March 2nd, 1861, under section twenty-two, in the mixed-material clause, until said act was amended by the act of August, 1861, substituting the word worsted for wool.

It also appeared in evidence that the plaintiffs' goods, from being woven of dyed yarns, presented two finished surfaces, both in figured, twilled, and plain goods, while the delaines printed after being woven were finished on one side only; but delaines dyed in piece of one color likewise had two sides uniform.

It was contended in behalf of the defendant, and there was evidence

tending to show that all fabrics for women's dresses of cotton
15 warp and wool or worsted filling woven in the gray and afterwards stained, colored or printed for women's dress-goods, were known as delaines at the time of the passage of the acts of Congress relating to the question at issue, and that Challis delaines, Persian delaines, Coburgs, Armures, &c., falling within said definitions, were then known in commerce as delaines.

The defendant further claimed, and introduced evidence tending to show that the plaintiffs' goods in controversy were of cotton warp and wool or worsted filling, and had the same general characteristics as delaines, not only in the materials of which they were made, but in texture, quality, and adaptation to the same uses, and that they were in fact used for the same purposes.

The plaintiffs introduced evidence tending to show that Challis delaines, Persian delaines, Coburgs, and Armures, were not at the time of the passage of said acts commercially known by the name of delaines (the two former being sometimes abbreviated into Challis & Persians), and contended that they were the goods of similar description to delaines referred to in the statute.

16 The defendant having introduced evidence tending to show that challis delaines, persian delaines, coburgs, and armures at the time of the passage of said acts were known as delaines, contended that they were included in the words of the statute "all delaines," and that the goods of similar description referred to therein must be goods other than challis, persians, coburgs, armures, or any other delaines.

Plaintiffs requested the court to rule as follows:

1. That the ninth section of the act of 1862, "on all delaines, cashmere delaines, muslin delaines, barége delaines, composed wholly or in part of worsted, wool, mohair, or goats' hair, and on all goods of similar description, not exceeding in value 40 cents per square yard, two cents per square yard, considered in connection with the 13th section of the act of 1861, to which it is additional, applies to goods woven in the grey, whether subsequently colored, printed, stained, or left in the grey, and is not applicable to goods woven in colors with yarn-dyed
17 warps or fillings, and if the jury believe from the evidence that the plaintiff's goods were not woven in the gray or natural color of the worsted and cotton, but were woven with colored warps or fillings, then their verdict must be for the plaintiffs.

2d. That if the jury shall find that these goods were manufactured of mixed materials, and were not manufactures possessing the peculiarities which distinguish delaines from other manufactures of wool and cotton, then, under the act March 2nd, 1861, such goods were classified and came within the mixed-material clause in section 22 of the act of March 2nd, 1861. Then neither the act of Aug. 5, 1861, or that of July 14, 1862, operated to take them out of that clause, and they so remained in the corresponding clause of 1862.

3d. That the 3d subdivision of sec. 13 of the act of March 2d, 1861, when construed with the rest of the wool clause of the same section, cannot be consistently construed to include under the clause "all other gray or uncolored goods of similar description," any goods made in part of wool which are not similar to delaines
18 in those peculiarities which give to the enumerated delaines their distinctions from other manufactures made wholly or in part of wool in the gray, and also that portion of the 3d subdivision, beginning after bunting, in order to be consistently construed with the 2d wool clause in the subdivision of the same section, the words "stained, colored, and printed" must be limited to the delaines in the gray com-

posed wholly or in part of wool in the preceding portion of the 3d subdivision when altered by being stained, colored, or printed. In section 9 of the act of July 14, 1862, the delaine clause, when construed with the rest of the wool clauses in the same section, the words "all goods of similar description," cannot be consistently construed to include any goods made wholly or in part of wool which are not similar to delaines in those peculiarities which separate delaines from other goods woven in the gray composed wholly or in part of wool; that the bunting clause in the 3d subdivision of section 13 of the act of March, 1861, as
19 amended by the act of August 5, 1861, and converted into a worsted clause, separated all stained, colored, or printed manufactures, of which worsted is a component material, from delaines in the gray by words referring to component material in contradistinction to any names which the manufactures might bear in commerce, and that the additional act of 1862, sec. 9, provided for this same class, described by their component material, an additional duty, and that in the delaine class previously described in the same section as a class, whether composed of worsted, or wool, or of mohair, or of goats' hair, the word' "goods of a similar description" should not be construed to supersede the specific worsted clause following it, except so far as the goods referred to shall not only be composed wholly or in part of worsted, but shall also have the characteristics and other peculiarities which distinguish the various delaines named as the criterion for the test of similar descriptions.

4th. In 1862 there was no statute definition of delaine as such, except when woven in the gray or uncolored, and the plaintiffs' goods,
20 if woven in colors, are not goods of similar description to the delaines of the statute of 1862.

5th. The words "similar description" in the delaine clause of the tariff act 1862, refer to such goods as have the greatest number of characteristics in common with delaines, and it is competent for the jury to regard the being woven in the gray or uncolored worsted, to which class these words were limited in the tariff act of 1861, as the first and chief criterion for the comparison, and in applying these words to goods having colored designs or figures upon them it is competent for the jury to demand that the colored designs or figures should be produced by a similar process as produced in the manufacture of delaines; and if the colored designs or figures on delaines are always produced by printing or staining after the cloth is manufactured in the gray, and the designs or figures upon the cloths in question were all produced in the loom by the act of weaving colored yarns, then it is competent for the jury to say that the cloths are not goods of similar description; and if the goods on which these duties were assessed differ from delaines
21 considerably in the process of manufacture, or in weaving, or in the process of dressing and preparing the surface, or in the quality and cost, or in the capacity to be worn either side out, or in their appearance, or in touch, feeling, or adaptation to peculiar tastes of customers, or in being ready colored for the market, as dress goods, when they leave the loom, without going to print or dye-works, then the jury are authorized to find that they are not goods of similar description with delaines.

6th. Revenue laws designate and class substances according to the general usage and known denominations of trade. The words "all goods of similar description" in the tariff act of 1862 refer to a similarity for revenue purposes with the goods previously enumerated, and this is determined by what was then generally known and classed among merchants as similar goods; and this is determined by what was then gen-

erally known and classed among merchants as similar goods; and if being woven in the gray, or natural color of the worsted, and other materials of which they were composed is found to have been an im-
22 portant and pervading characteristic commonly distinguishing goods known among merchants as of similar description with delaines, then the goods on which the duties in this case were assessed were not of similar description with delaines, unless the jury find they were so woven in the gray or natural color, and unless these goods possessed all the pervading characteristics which in 1862 were commonly understood among merchants as distinguishing goods known in commerce as of a similar description with delaines from all other goods, the plaintiffs are entitled to a verdict.

The court refused each of said instructions as called for by the plaintiffs, and did instruct the jury that said prayers, so far as the act of 1861 was in question, were not important; as, however that act might be construed, the plaintiffs' goods were liable to a duty of thirty per cent. ad valorem under that act, which they did not contest.

The court further instructed the jury as follows: In the act of 1861 we find various provisions applicable to worsted goods, applicable
23 to delaines, applicable to mixed goods. I have been asked in the requests here, on the one side and the other, to declare to you the various qualifications and legal effect of those clauses which are found in the act of 1861. "I decline to give you any of those instructions, or to instruct you in regard to the law of 1861, and further than this, that I say to you that under the law of 1861, as amended by the act of August, 1861, these goods, if they had been then imported, would have been subject to a duty of thirty per cent. ad valorem, but under which clause in the law they might come, so far as the determination of this case is concerned, it is not important for me to instruct you." But it has become important that I should say to you, and I do say to you, that under the law of 1861 the defendant was justified (whichever clause the goods came within) in demanding a rate of duty thirty per cent. ad valorem, so that, so far as that particular demand is concerned, of a duty of thirty per cent. ad valorem, it is admitted, I suppose, that the defendant was justified in demanding it under the law of 1861.
24 The law of 1862 is the one under which the collector demanded an additional rate of two cents per square yard. It is not contended that these goods are not included in the act, but it is claimed by the parties plaintiff that under that act the additional rate of duty was five per cent. ad valorem, and not two cents per square yard. And although it may seem that it would make very little difference whether the duty were five per cent. ad valorem or two cents a square yard, yet it appears that the difference, even to these gentlemen engaged in this business, amounts to a considerable sum. The question is not, therefore, what was the rate of duty imposed on these goods under the law of 1861, but it is what was the additional rate of duty to which these goods were subject under the law of 1862, whether it was two cents per square yard or five per cent. ad valorem. There are various clauses of the statute of 1862 which may be considered as bearing upon the question, and the first one reads as follows: "On all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of worsted,
25 wool, mohair, or goats' hair, and on all goods of similar description, not exceeding in value forty cents per square yard, two cents per square yard." That is the clause which the government claims was applicable to this class of goods. There are two other clauses in this act under which the plaintiffs claim that these goods may be brought;

that although in common language they are described as delaine goods, they did not come under the delaines clause, as it is called; but it was under one of the other clauses that the duties should have been imposed. Those two clauses are as follows: "On bunting, worsted yarns, and all other manufactures of worsted, or of which worsted shall be a component material, not otherwise provided for, five per cent. ad valorem." And then, secondly, it is declared that on all manufactures not otherwise provided for, composed of mixed materials, in part of cotton, silk, wool, hemp, jute, or flax, a duty of five per cent. ad valorem shall be imposed.

Now, gentlemen, I propose to tell you what I understand the delaine clause in the act of 1862 to mean, and so far as that particular point
26 is concerned, I shall give you the instructions as requested by the government, that the delaine clause in the act of July, 1862, on all delaines, muslin delaines, barege delaines, &c., imposes a specific duty on all delaines, whether colored or uncolored, and all goods of similar description to delaines, whether colored or uncolored, if such delaines or goods of similar description do not exceed in value forty cents a square yard. And the context of the act shows that this specific duty is additional to the ad valorem duty imposed by the act of March 2d, 1861, as amended by the act referred to of August, 1861, so that in determining the question which you have to pass upon you will determine whether the goods in question are similar description to these delaines, whether they are colored or uncolored. Now what I have to say upon this matter I propose to say very briefly, and I have written down what I shall say so that there may be no question, and I shall give you nothing more than what I have written here in regard to it.

This issue must be determined under the instructions which
27 you may receive from the court, and you are bound to take into consideration all the evidence bearing upon the question of what kind of goods were the delaines mentioned in the act of Congress, and whether the plaintiffs' goods upon which the two cents per square yard were exacted were or not of a similar description. These words are to be taken and understood in their popular and received import as generally understood in the community at large at the time of the passage of the act. There is one request made by the plaintiffs here that I should

"to be taken in the sense used by merchants; the re-

Hon. J. Z. GOODRICH,

Collector of Customs for the Port of Boston & Charlestown:

SIR: We hereby protest against payment of a duty of thirty per centum ad valorem and two cents per square yard upon goods in C F H B 1550-51, 528-530, C F H 1904-1905, & C F H Co. 878, C. F. H. & Co. 687, C. F. H. 276277, 22585, 528-529, C. F. H. & Co. 813-816, imported per Arabia, arrived Sept. 17th, 1862, claiming to make entry of said goods at thirty-five per centum ad valorem, for the reason that they are not similar to delaines, a delaine cloth being a light fabric of cotton
35 warp and worsted weft, and made of yarns not dyed, the cloth being printed or dyed in the piece, while the checked goods in the above-noted cases are made from dyed yarns, and are neither dyed nor printed in the piece, while the reps are made with a heavy cord in the warp or weft, making a fabric quite unlike any that have ever been known in commerce as delaines.

We protest against payment of any other rate than thirty-five per

cotton and worsted filling, without color of any kind when woven, but the color was subsequently applied, and those were the delaines referred to in the act as I understand it. Now, what were the plaintiffs' goods? because, in order to authorize the imposition of a duty of two cents
29 per square yard, they must be goods of 'similar description' with the classes of delaines that are enumerated in that section. The goods of the plaintiffs, as I understand the testimony, upon which the duty of two cents per square yard was exacted, it is admitted were also a ladies' dress goods of cotton warp and worsted filling, and it is therefore claimed on behalf of the government that the two kinds of goods are of a similar description. In the matter of the materials used in their manufacture and of the purposes for which they are made, I do not understand that their similarity is very seriously questioned. But the plaintiffs claim that in other material important respects which enter into the very article itself they are substantially different. It is said (and about that I believe there is no dispute) that while the filling of the plaintiffs' goods is of worsted, it is never at the time of weaving plain uncolored yarn, but is dyed either in the wool or yarn before weaving and it claimed by the plaintiffs that by using such a colored yarn instead of plain yarn a fabric entirely different
30 from a delaine is the result. It is also claimed by plaintiffs that this weaving of colored yarns requires changes in the looms, rendering the process more complicated, and also that the cost of manufacture of the plaintiffs' goods is greater, and thereby they are more expensive to the consumer. It is also claimed by the plaintiffs that delaines are faced or finished on one side only of the fabric, and that the goods of the plaintiffs on each side are substantially alike, with finished faces, so that thereby a more useful and desirable article is produced, as the same, when partially worn, may be made over and turned for further use, if the wearer so desires. It is also said, I believe, by one or more of the witnesses, that goods such as plaintiffs imported require a larger or better article of worsted than the delaine fabrics. I think a single witness testified as to that, I do not know but more; but you will determine about that. Whether these differences do or do not exist, and to what extent, and how far the cloth thus produced is
31 or not thereby a different fabric, are all matters for the careful consideration and determination of the jury. not contended that these goods are not included in the act, but it is claimed by the parties plaintiff that under that act the additional rate of duty was five per cent. ad valorem, and not two cents per square yard. And although it may seem that it would make very little difference whether the duty were five per cent. ad valorem or two cents a square yard, yet it appears that the difference, even to these gentlemen engaged in this business, amounts to a considerable sum. The question is not, therefore, what was the rate of duty imposed on these goods under the law of 1861, but it is what was the additional rate of duty to which these goods were subject under the law of 1862, whether it was two cents per square yard or five per cent. ad valorem. There are various clauses of the statute of 1862 which may be considered as bearing upon the question, and the first one reads as follows: "On all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of worsted,
25 wool, mohair, or goats' hair, and on all goods of similar description, not exceeding in value forty cents per square yard, two cents per square yard." That is the clause which the government claims was applicable to this class of goods. There are two other clauses in this act under which the plaintiffs claim that these goods may be brought;

writ, so that it is not one element only you are to consider, but you are to take into consideration all the elements. You will consider the point which is dwelt upon with so much strength and force by the learned counsel for the plaintiffs, of one article being made of plain wool and the other being made of dyed wool with a different fabric as the result, and say whether these two goods are substantially the same or substantially different, but every element is to be considered and not one alone.

I have been asked to give you certain instructions by the plaintiffs. So far as those instructions are covered by what I have said, you will conform to them. Most of them relate to the act of 1861, and
33 to the operation of that act. I have said to you, as I say again, that so far as the act of 1861 is concerned, all we have to do with that for the purposes of this trial is to find out what were the duties in the act of 1861, and not particularly into which class of goods these fell. That I do tell you, and that is all you need require from me, that under the act of 1861, the goods were subject to a duty of thirty per cent.

The 11th prayer of the defendant, which was as follows, was given by the court: The instruction I give you, as requested, that the similarity referred to by the expression "goods of similar description" in the act of 1862 is a similarity in respect to the product and its adaptation to uses and to its uses, and not merely to the process by which it was produced, and that because, if a class of goods were not in 1862 commercially known as delaines, it does not follow that they were not goods of "similar description" within the meaning of the statute.

34 To the above rulings and refusals to rule the plaintiffs except, and pray that their exceptions may be allowed, and the same being found conformable to the facts are allowed and sealed, and ordered to be filed, as of the fifteenth day of June, 1875, before the jury left the bar.

[L. S.] EDWARD FOX,
Justice Presiding at Trial.

Copy of protest.

BOSTON, *April 25th*, 1862.

Hon. J. Z. GOODRICH,
Collector of Customs for the Port of Boston & Charlestown:

SIR: We hereby protest against payment of a duty of thirty per centum ad valorem and two cents per square yard upon goods in B C F H 1550-51, 528-530, CF III 1904-1905, & C F H Co. 878, C. F. H. & Co. 687, C. F. H. 276277, 22585, 528-529, C. F. H. & Co. 813-816, imported per Arabia, arrived Sept. 17th, 1862, claiming to make entry of said goods at thirty-five per centum ad valorem, for the reason that they are not similar to delaines, a delaine cloth being a light fabric of cotton
35 warp and worsted weft, and made of yarns not dyed, the cloth being printed or dyed in the piece, while the checked goods in the above-noted cases are made from dyed yarns, and are neither dyed nor printed in the piece, while the reps are made with a heavy cord in the warp or weft, making a fabric quite unlike any that have ever been known in commerce as delaines.

We protest against payment of any other rate than thirty-five per

centum ad valorem, and pay the specific rate only to obtain possession of the goods.

Yours, respectfully,

C. F. HOVEY & CO.

A true record. Attest:

JOHN G. STETSON, *Clerk.*

36 UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record and of all proceedings in the cause of Richard C. Greenleaf et al. v. John Z. Goodrich, in this court determined.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this eighth day of December, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the one hundred and first.

JOHN G. STETSON, *Clerk.*

37 *Bond on writ of error.*

Know all men by these presents that we, Richard Greenleaf, Henry Woods, Samuel Johnson, jr., William Endicott, jr., Thomas Mack, and Augustus De Peyster, all of Boston, in the Commonwealth of Massachusetts, merchants, and copartners under the firm and style of C. F. Hovey & Company, as principals, and William E. Coffin and Samuel R. Payson, both of said Boston, as sureties, are held and firmly bound unto John Z. Goodrich in the full and just sum of three hundred dollars, to be paid to the said John Z. Goodrich, his certain attorney, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated the first day of December, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas, lately, at a circuit court of the United States within and for the district of Massachusetts, in a suit depending in said court between said Richard Greenleaf, Henry Woods, Samuel Johnson, jr., William Endicott, jr., Thomas Mack, and Augustus De Peyster, plaintiffs, and John Z. Goodrich, defendant, judgment was rendered against the said plaintiffs, and the said plaintiffs having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiffs, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said plaintiffs shall prosecute their said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above

obligation to be null and void; otherwise, to remain in full force and virtue.

C. F. HOVEY & CO. [L. S.]
WM. E. COFFIN. [L. S.]
SAMUEL R. PAYSON. [L. S.]

Signed, sealed, and delivered in presence of—
WALTER C. HARRIS.
GEORGE C. BLANCHARD to W. E. C.
C. L. CARTER.

Approved:

JOHN LOWELL,
District Judge.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest:

JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

(Indorsement on cover:) No. 357. Richard C. Greenleaf, Henry Woods, Sam'l Johnson, jr., William Endicott, jr., Thomas Mack, & Augustus DePeyster, copartners, as C. F. Hovey & Co., plaintiffs in error, vs. John Z. Goodrich, late collector of customs. Massachusetts C. C. U. S. Filed 31st March, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 127. October Term, 1879.

RICHARD C. GREENLEAF, HENRY WOODS, SAMUEL JOHNSON, JR., WILLIAM ENDICOTT, JR., THOMAS MACK, AND AUGUSTUS DEPEYSTER,

COPARTNERS,

AS C. F. HOVEY & CO.,

PLAINTIFF IN ERROR,

v.

JOHN Z. GOODRICH,

LATE COLLECTOR OF CUSTOMS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR APPELLANTS.

CHARLES LEVI WOODBURY,
of Counsel for Appellants.

STATEMENT OF ERRORS.

The pervading errors claimed in this case are an

Erroneous construction of the clause in force taxing the delaine family of goods, which defendant relied upon.

Giving the jury erroneous tests for comparing the plaintiff's goods with the delaine clause, and excluding the proper tests.

Withholding from the jury all consideration of the clauses of the statute the plaintiff relied on.

The errors are particularly specified as follows: —

The collector had assessed on the import the additional duty to which delaines and mousseline delaines and goods of similar description *were liable under the* Act of 1862, the import being a manufacture of mixed materials in part wool and worsted, and so classed under the Act of March, 1861. The general terms of clauses in three Acts in force at the date of importation, March 2, 1861, August, 1861, and the Act of 1862, related to articles of such composition, viz., under the third subdivision of Sect. 13, 1861, following the words "on bunting," its amendment in August, 1861, and in 1862 its additional clause. The plaintiff asked the Court to construe the bearing of these clauses, which the Court declined, and charged the jury that, so far as the Act of 1861 was concerned, it was not important in this case.

General clauses existed in force in the tariff Acts of 1861 and 1862 relating to manufactures composed of mixed materials in part cotton, wool, worsted, etc. The plaintiff also requested the Court to construe the bearing of these clauses on the import, which the Court refused, and charged the jury that, so far as the Act of 1861 was concerned, it was of no importance in this case.

The errors on this point: —

1. Refusal of the prayer as to the "bunting," etc. clause.
2. Refusal of the prayer as to the "mixed material" clause.
3. The charge to the jury as to these clauses of the statutes that it was not important in this suit for him to instruct the jury.
4. Failure to instruct the jury as to the effect of the clauses in the Act of 1862 on bunting, etc., and that on "mixed material" on the plaintiff's import.
5. Taking the consideration of the application of these clauses to the import entirely from the jury.

B. Errors in the construction of the delaine clauses, as in force in the Acts of 1861 and 1862.

1. Charging in substance and effect that neither the "mixed material" clause nor the "bunting" clause in force in the Acts of 1861 and 1862 limited the scope of the "delaine" clause of 1862 on plaintiff's goods made of the materials named in each of these clauses, provided plaintiff's goods were adapted to the use or were used for the same purposes as the delaines were.

2. Refusing to recognize or to permit the jury to be controlled by the commercial understanding of known denominations in trade, or usage of merchants as to what in commerce and trade constituted "goods of a similar description" to "all delaines, mousseline delaines, barege delaines, composed wholly or in part of worsted, wool, etc.," in construing the clause under which the defendant exacted.

C. Refusing the third prayer of plaintiff as to the bunting, etc., clause.

D. Refusing the fourth prayer, that the statute defined delaines as woven in the gray, and plaintiff's goods, if woven in colors, were not goods of similar description to the Statute of 1862.

That the similar description of the Act of 1862 refers to the being woven in the gray of 1861 as the first criterion for comparison, and goods whose figures are made by weaving colored yarns into figures are not of similar description, unless their colors are produced by the delaine process, and if plaintiff's goods differ from delaines considerably in process of manufacture, in dressing and preparing the surface, in quality, cost, capacity to be worn either side out, in appearance, feeling, adaptation to peculiar tastes of customers, and in going from the loom to market without going to the print works, then the jury are authorized to find they are not of similar description with delaines.

E. Refusing fifth prayer.

F. Refusing the sixth prayer for instructions, that the class indicated by "goods of a similar description" is to be determined by what was generally known and classed among merchants as similar goods to delaines, etc.; and unless these goods possessed the pervading characteristics distinguishing goods known in commerce in 1862, as of a similar description to delaines from all other goods, plaintiff was entitled to a verdict; and charging that if a class of goods were not in 1862 commercially known as delaines, it does not follow they were not goods of "similar description" within the statute.

G. In connection with the same refusal, charging the jury that the words "similar description" were not to be taken in the sense used by merchants, but were to be understood in their popular and received import.

H. In the connection with this construction defining these words to the jury in the language of defendant's eleventh prayer and not leaving them to determine on the evidence what this popular import was.

PARTS OF JUDGE'S CHARGE REFERRED TO IN THESE ERRORS.

The portions of the judge's charge, referred to in the above points as excepted to, are as follows. As to the points on first page of the statement of errors the judge said, —

"I decline to give you any of these instructions, in regard to the law of 1861 . . . but under which clause in the law they might come, so far as this determination of the case is concerned, it is not important for me to instruct you.

"I have said to you, as I say again, so far as the Act of 1861 is concerned, all we have to do with that for the purposes of this trial is to find out what were the duties in the Act of 1861, and not particularly into which class of goods these fell. Under the Act of 1861 the goods were subject to a duty of thirty per cent."

B 1. The judge said, "I have said to you, as I say again, that so far as the Act of 1861 is concerned, all we have to do with that, for the purposes of this trial, is to find out what were the duties in the Act of 1861, and not particularly into which class of goods these fell: that I tell you and that is all you need require from me, — that under the Act of 1861 the goods were subject to a duty of thirty per cent."

And further, "The instruction I give you as (defendant) requested, that the similarity referred to by the expression 'goods of similar description' in the Act of 1862 is a similarity in respect to the product and its adaptations to uses and to its uses."

G. The judge said, "There is one request made by the plaintiffs here that I should say that they are to be taken in the sense used by merchants. The request is substantially that these words of similar description, I say to you in my view, are to be taken in their popular and received import, as understood by the community at large at the time of the passage of the act." "If a class of goods were not in 1862 commercially known as delaines, it does not follow that they were not goods of similar description within the meaning of the statute."

K. and L. The judge said, "If you find that the product or result is an article for ladies' dresses made with a cotton warp and worsted filling, the question for your determination is whether the two kinds of goods are substantially the same and alike. The process of manufacture, the worsted in the goods of the plaintiffs being dyed previously to weaving, is an element to be considered by the jury in coming to their conclusion, but not alone and distinct from all others which may have been established. It is for the jury to

determine from all the evidence in the case whether by the colored filling, made and woven in the way and manner described with cotton warp, the product is or not an article substantially similar and like delaine fabrics; whether or not, while varying more or less in some particulars from delaines, the goods were or not *substantially* the *same* or *substantially different* from them. If substantially the same article, then the duties were properly assessed, but if they were *substantially* different, and the plaintiffs' goods were not of a *similar description* to the delaine fabrics, then they were not subject to the additional duty of 5 per cent"; and further, "the similarity referred to by the expression 'goods of similar description' in the Act of 1862 is a similarity in respect to the product, and its adaptation to uses and to its uses, and not merely to the process by which it was produced."

H. and N. The eleventh prayer of the defendant, which was as follows (folio 33) was given by the Court: "The instruction I give you, as requested, that the similarity referred to by the expression 'goods of similar description' in the Act of 1862, is a similarity in respect to the product and its adaptation to uses and to its uses, and not merely to the process by which it was produced, and that because if a class of goods were not in 1862 commercially known as delaines, it does not follow that they were not 'goods of similar description' within the meaning of the statute."

P. (Fol. 28.) "The goods (delaines) for the most part were dyed or printed or colored, and afterwards sold as dress goods for ladies' wear. . . . Here is found, if I am correct in my view of the evidence, of which the jury will judge, a class of dress goods of cotton and worsted filling, without color when woven," etc.

(Fol. 29.) "The goods of the plaintiffs, as I understand the testimony . . . it is admitted were also a ladies' dress goods of cotton warp and worsted filling: and it is therefore claimed on behalf of the government that the two kinds of goods are of *similar description*.

"In the matter of materials used in their manufacture, and *of the purposes for which they* are made, I do not understand that their similarity is very seriously questioned."

The plaintiffs claim that in other material important respects they are substantially different, etc. (Fol. 31.) "If you find that the product or result (plaintiffs') is an article *for ladies' dresses*, made with a cotton warp and worsted filling, the question for your determination is whether the two kinds of goods are substantially the same and alike."

(Fol. 32.) "If substantially the same article, then the duties were properly assessed; but if they were substantially different and were not of a similar description to the delaine fabrics, then they were not subject to the additional duty of two cents per square yard, but only to an additional 5 per cent."

I. Excluding from the jury any comparison of the import with the various delaines named in the statute by means of the commercial or mercantile standards of similarity of description.

K. Charging the jury that they might consider the process of manufacture and finish of the goods on the question whether plaintiff's goods were substantially the same or different from the named delaines of the statute, and if substantially alike, they were liable to that duty, but that if substantially different, that would not alone withdraw them from the *delaines clause*.

L. Failing to give any sufficient rule to the jury defining what constituted substantial difference or substantial similarity to the delaines clause, and in this connection rejecting plaintiff's prayers that the pervading characteristics of the named delaines were a test; that the commercial understanding was; and that the revenue characteristic these delaines had acquired of being woven in the gray was; and that the peculiarities which distinguish these delaines from other manufactures of cotton and wool or worsted were.

M. Charging the jury that the similarity intended by the words "goods of a similar description," in the delaines clause, is a similarity in respect to the product and its adaptation to uses and to its uses, and not merely to the process by which it was produced; and that if a class of goods were not, in 1862, commercially known as delaines, it does not follow they are not goods of a similar description.

N. Directing the jury that they must find that plaintiff's goods were not only substantially different as goods from the statute delaines, but that the jury must also find that they were not of a "similar description" to such delaines in relation to their uses and adaptations to use, as defined in defendant's eleventh prayer, before they are entitled to be subject only to the five per cent additional duty.

O. Error in granting the eleventh prayer of defendant.

P. Charging the jury that if the plaintiff's goods were found to be an article for ladies' dresses (fol. 31), the substantial difference of the fabrics from the delaines did not entitle the plaintiff to recover, but the jury must then compare by the similarity of uses described in answer to defendant's eleventh prayer.

BRIEF.

The plaintiff imported in 1862 certain several goods known in commerce as Saxony dress goods, and particularly known as poil de chevre, reps, plaids and lustres. These goods had in common the peculiarity of being woven of colored yarns, on a plaid or jacquard loom, in plaids, figures, etc., and finished on both sides. Such goods paid duties as manufactures of mixed material in 1861, thirty per cent, and in 1862, that item was taxed an additional duty of five per cent. Plaintiff claimed to enter them at thirty-five per cent ad val.

The collector levied a duty of two cents a square yard additional under the clause "on all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of worsted, wool, mohair or goat's hair, and on all goods of similar description not exceeding in value forty cents per square yard." Plaintiff protested that the goods were not of similar description to delaines and that they were liable to thirty-five per cent duty only.

The proper amount of duties depends on the bearing of three clauses of the tariff of 1861 and 1862 on the import.

Vol. 12, p. 353. — (1.) The square yard duty of two cents additional on all delaines, cashmere delaines, barege delaines, mousseline delaines composed wholly or in part of worsted, wool, mohair or goat's hair and on all goods of a similar description.

Vol 12, p. 557. — (2.) Manufactures not otherwise provided for composed of *mixed materials* in part cotton, silk, wool or worsted, hemp, jute or flax, five per cent.

Page 552. — (3.) On bunting, worsted yarns and on all other manufactures of worsted, or of which worsted shall be a component material, not otherwise provided for, five per cent.

The plaintiff, thinking the Act of 1861, which was still in force, and *in pari materia*, threw light on the application of these additional duties, offered prayers, — No. 2 as to the construction of the *mixed material* clause in both Acts, and No. 3 as to the application of the bunting clause in both Acts. The judge refused these.

The plaintiff also offered prayers Nos. 1, 3, 4 and 5 on the construction of the delaines clause, in which the Act of 1861 was resorted to in aid of the construction.

These the judge refused, and charged that he declined, and told the jury further it was not important for them to know under which clause of the Act of 1861 the goods were liable to the duty of thirty

per cent. There was error in this expressed contempt for the rule of interpretation, that statutes *in pari materia* should be constructed together. There was further error in the refusal of the construction of the statute which the prayers called for.

In the tariff of 1846, plaintiff's goods were taxed as the case might be, either as "wool, a component of chief value," or as a manufacture where "worsted shall be a component material, not otherwise provided for," and so continued. The tariff of March 2, 1861, created five classes of goods by description of materials.

§ 13. — (1.) All manufactures of wool not otherwise provided for.

(2.) On all delaines, cashmere delaines, barege delaines composed wholly or in part of wool, gray or uncolored, and on all other gray and uncolored goods of similar description.

12 Stat. p. 185. —(3.) On bunting, and on all stained, colored or printed, and on all other manufactures of wool, or of which wool shall be a component material, not otherwise provided for, thirty per cent.

12 Stat. p. 192, § 22. — (4.) Manufactures not otherwise provided for, composed of mixed materials, in part of cotton, silk, worsted, wool or flax, thirty per cent.

(5.) Manufactures of which mohair shall be a component material, not otherwise provided for.

(6.) Bunting, and on all stained and printed, etc., evidently took *colored* woollen cloth out of (1). The description excluded them from (2). The evidence (fol. 14) shows the treasury department classed the goods woven in colors as "manufactures of mixed materials" (4), and collected thirty per cent duty without dispute.

The Act of August, 1861 (12 Stat. p. 294), struck the word "wool" out of clauses 2 and 3, and inserted "worsted." Prior to this amendment, there was no clause that imposed any duty on "wholly worsted" goods. On the principles of revenue law, the words "or of which worsted shall be a component material, not otherwise provided for," being the last clause, does not affect the prior provisions of the mixed materials.

23 Wallace, 381, 6 Otto, 117.
Powers v. *Barney*, 5 Blatch. C. C. 202.

This clause, therefore, did not, it is believed, disturb the plaintiff's goods which already were provided for, hived because of their specified and enumerated mixed materials in (4). There were other mixtures of worsted on which it could operate (see Act 1862), as hemp and jute and flax.

In 1862 (12 Stat. p. 552) additional duties were imposed on some of the goods classed in 1861, and the construction of this Act *in pari materia* with the others is in dispute. Section 9 begins, "In

addition to the duties heretofore imposed by law," etc. Section 13 begins with the same words, and imposes five per cent additional duty. (Page 557.) We find in this section "manufactures not otherwise provided for, composed of mixed materials in part of cotton, silk, wool or worsted, hemp, jute or flax." Here is clause (4) of 1861 totally repeated, and three more substances named besides. Below is the mohair (5) clause repeated.

We submit to the court that these two sections, 9 and 13, express by their enacting words that they are additional impositions on the *same* articles heretofore enumerated in the Act of 1861. Both Acts, therefore, are *in pari materia*, and subject to a comparison and collation to ascertain their revenue purpose and construction.

The assignment of errors of the court below states that the learned judge refused to collate and compare these statutes, rejected the prayers as to their construction, and charged the jury that the matter in the Acts of 1861 and 1862 was not important in the consideration of the case by them or influential in the construction he gave of the law. (Fols. 22, 33.)

The evidence shows this import had paid duty in 1861 under the mixed material clause; that clause had been repeated *in totidem verbis* in 1862 as subject for an additional duty, and hence no repugnancy could be suggested, and the additional clause carried the whole of the clause of 1861. One contest at bar was whether this import came under the "mixed material" or the delaine clause of 1862. Inevitable necessity in 1861 forced plaids and Saxony dress goods, etc., under the mixed material clause. Every succeeding clause that threatened was prevented from colliding with their position there by the "not otherwise provided for" being attached. Had the judge considered statutes *in pari materia* to be a source of construction of each other, he would not have put himself in conflict with the unanimous opinion of this Court delivered in

> *Reiche* v. *Smythe*, 6 Otto, p. 164, —
> 23 Wall. 382,

"It is fair to presume in case a special meaning were attached to certain words in a prior tariff act, that Congress intended they should have the same signification when used in a subsequent act in relation to the same subject matter," but he failed to see the importance and the scope of the mixed material clause.

On the unquestioned evidence, we submit that the comparison of the statutes referred to amply demonstrates that this import should properly have been classed for dutiable purposes under the mixed material clause, and was only liable to thirty-five per cent duties.

The plaintiff's second prayer in due and proper form asked the judge to construe these statutes *in pari materia* and charge the jury

that if plaintiff's goods were mixed materials and did not possess the peculiarities which distinguish delaines from other manufactures of wool and cotton, then they were in the mixed material clause of 1861, and so remained in the clause of 1862, which he refused to give, actually charging the jury that it was of no importance in the case where our import was classified, under the Act of 1861, and saying nothing to them about the clause in the Act of 1862. We came into court for a construction of the mixed material clause, offered ample evidence bearing on its relations to our import and to the delaine clause, and maintain now that it was error of practice that our affirmative claim under that statute was not submitted by the judge to a jury. Constitution U. S., 7th amendment.

True it is the judge construed the delaines clause substantially as limitless in including textile fabrics, that he gave *none* on the mixed material clause of 1862 to the jury nor even to the counsel.

THE BUNTING CLAUSE, PRAYER 3 REFUSED.

This prayer again attempted by construction of the statutes in force to distinguish the line between the bunting and other wool and worsted clauses, and the square yard delaines clause.

All the clauses were *in pari materia*, their comparison tended to ascertain the intent of the legislator as to the application of the various duties to fabrics imported, into whose composition wool, worsted and cotton entered. Congress certainly meant that some fabrics of wool, worsted and mixed materials were not to be classed as of "similar description" to the delaines named.

The testimony shows the import was within the scope of the bunting clause unless it was provided for otherwise. Two such *prima facie* provisions were set up in the case, — the mixed material and the delaines. The instruction was asked in reference to the delaine clause, that to take it out of this bunting, etc., clause, it must not merely be composed wholly or in part of worsted, but shall also have the characteristics and other peculiarities which distinguish the various delaines named as the criterion for the test of "similar descriptions." This is a correct rule of interpretation. It was erroneously refused in order to set up the eleventh prayer of the defendant as the rule for the case. Another error was that no construction of the bunting, etc., clause, either of 1861 or 1862, was given to the jury, not even of the "not otherwise provided for" addenda of it. This neglect was an error of practice similar to that about the mixed material clause. Our claim was withheld from the jury under this clause.

The statutes of 1861 and 1862 taken together show that the words "goods of a similar description" had a limited significance. The words "goods of a similar description" had a meaning in the Act of

1861 before it was amended, which affect the scope of these words when again used in the same context in 1862.

In 1861 its meaning was narrow: none were taxed in the delaine clause but such as were "composed wholly or in part of wool" and "woven in the gray."

Those made wholly or in part of worsted or mohair were not in the clause. The words "all other gray and uncolored goods of similar description" could not expand to reach them. Neither Congress nor the department doubted, and in August Congress struck out "wool" and inserted "worsted" — pretty strong proof of their view of the narrow scope of the "similar description." As amended, it again left out "wool" and "mohair" "in part or in whole," and the Act of 1862 had so little faith in the scope of the general words that it put these materials into the additional duty by name at two cents per square yard, — strong proof Congress did not think "uses" was covered by these words. There is a little more instruction in this statute. The gray delaines of 1861 paid only twenty-five per cent, while the other component, "worsted" or "mixed materials," paid *thirty* per cent, — five per cent higher, whether in the gray or not. The Secretary did not want to enlarge the scope of the general words of this differential clause made for the benefit of delaine print works in America. He wanted money for the war, and when Congress put "worsted" in, they took "wool" out and left it in the higher class of mixed materials. It was perfectly intentional then that these singularities should appear, and negative the idea that Congress used the words "similar description" to denote a similarity of uses as the standard of classification.

Thus Congress and the treasury each shew they attached in both the Acts of 1861 the restricted meaning to "goods of similar description," of which the various delaines enumerated, woven in the gray, furnished the standard. Logically the words referred to these described commercial delaines, not by their "uses" or "adaptations to use," but by description *as a commercial* article, and did not include even all the delaines of commerce, either by name or by material, nor did it touch them when *printed*.

Other clauses reached various of the delaines of commerce, "the bunting clause," "mixed material," "mohair clause." Goods not known as delaines in commerce were not in its purview.

In face of this significance, when the self-styled "additional" clause is grafted on to this, wherein the same and no other commercial names are repeated as standards, but all the various materials for delaines are recited, we are told that the old words of reference repeated from 1861 no longer mean a similar comparison to what they did then, but now imply and demand a comparison of uses. The delaine family is peculiar in bearing the same names in commerce (fol. 12), whether in the primal condition "woven in the gray" or after being printed and dyed in the piece, no additional duty

being levied in 1862 on any goods because "stained, printed or dyed." Nor does this clause appear to levy additional duties on any delaines when their value exceeds forty cents per square yard. The clause of 1862 is broader, as to the materials of and condition the delaines are in, than was the clause of 1861. But this gives no reference beyond the delaines of commerce. The plaids and Saxony dress goods, etc., of commerce and which never were "woven in the gray" nor "printed or dyed" after being woven, fall naturally under the other provisions in force in 1862, just as they had done in 1861 and earlier (and just as the poplins, bombazines, serges and thibets always had and continued to do). It only is because they are intended for human use that a similitude is sought to be set up by the judge's charge. Their materials are within the bunting and the mixed material clauses.

The purport of the plaintiff's third prayer was that the similarity must be in that which made goods the delaines of commerce and in the materials named in the statute. It was refused, and the jury were told all construction of the application of the clauses plaintiff relied on to his import were unimportant. This left to the charge in *the use* exclusive power in the jury's mind.

THE DELAINES AND GOODS OF A SIMILAR DESCRIPTION.

The Court erred in refusing the first prayer. The evidence having established that all the delaines named in the Act of 1862, and all those named in the Act of 1861, and all those known in 1857, either as delaines or as mousseline delaines, invariably were woven of yarns in the gray or natural color, and were printed in print works in figures or designs or else dyed in print works, and plaintiff having established that their goods were woven of colored yarns and the figures were produced by the intermingling of the colored yarns by weaving them in plaid or jacquard looms into a web; that these goods were never in the gray at any time in the process of weaving, that they were known in commerce by other names than delaines, and were distinguished from them in weight, appearance, and finish, and durability for wear, we had a right to the instruction. It took no fact from the jury, it defined the delaine clause as applicable to the case before the court correctly.

An examination of the delaine clause will show the Court erred in the construction it gave to it.

1. The Act of March 2, 1861, put the named delaines when composed wholly or in part of wool, and imported in the gray, at twenty-five per cent.

Those of other materials in the gray and colored or printed delaines were in various clauses at thirty per cent.

A controversy was then pending in court, under the Act of 1857, whether mousseline delaines were known in commerce as "delaines,"

and were thus dutiable in 1857, or were dutiable as "a manufacture of worsted" under which they were classed in 1846, which has since been decided.

See Hutton v. *Shell*, N. Y. 1879, per Shipman, J.

The jury found that the "delaines" of the Act of 1857 referred exclusively to those made of a cotton warp and wool or worsted filling.

Since 1857, when "delaines" first appeared in the tariff, there had grown up a variety of other fabrics of wool or worsted in whole or in part besides those specially named in the Act of 1861, having in commerce particular names, as challis delaines, Persian delaines, coburgs, armures, and perhaps others, which while differing in style from others had the pervading and common characteristic of being woven in the gray, and then printed in designs or colored, very much as a cotton calico or muslin is printed. The distinction of five per cent in favor of the gray goods in 1861 was evidently in favor of the print works in the United States.

In August, 1861, Congress struck out "wool" and inserted "worsted" in the delaine and bunting clauses, probably to correct an error of description; this lowered worsted delaines in the gray, but advanced wool delaines in the gray.

There was no duty by its commercial name levied on the printed delaines, nor on any of the wool, mohair or goat's hair delaines woven in the gray.

The American printers either got all they asked, or all Congress was willing to concede to them.

In 1862 Congress placed additional duties on certain enumerated articles.

Among those, § 9 certainly proposed to advance the duties on all the delaine family proper of a certain value.

It included those wholly or in part composed of mohair, wool, goat's hair, as well as worsted. It named "all delaines, cashmere delaines, *muslin* delaines, barege delaines," thus including both the cotton warp "delaines" and "muslin delaines," the subject at that time of litigation under the Act of 1857, and it said "on all goods of similar description." The testimony shows at that time "challis delaines, Persian delaines, coburgs and armures," not named in the statute, but commercially known as belonging to the delaine family.

If you assume that Congress used these words in their ordinary sense as commercially applied to fabrics, the delaine family is intended to be included; nothing is named in the clause which refers to any other family of goods; nor which describes any delaine by its *uses*.

How are delaine fabrics known in commerce?

The testimony shows and the Acts of 1861 in force concurrently with § 9, 1862, show that being "woven in the gray or with uncolored yarn" is a prevading characteristic. The named delaines all are

described (1861, § 13) as being woven in the gray, and § 9 repeats their *names* as the standard fabrics with which the comparison is to be made. No other test is given.

In commerce, a delaine is known by its materials, its being woven in the gray; and certain consequences of appearance and quality, which flow from its process of manufacture.

As a calico is distinguished from a gingham, in cotton goods, or a printed muslin from woven lace, so in these products of the loom is the distinction between surface designs made by printing cloth woven in the gray, and goods where surface designs are part of the fabrics, made by weaving colored yarns.

Thus also a brocade is distinguished from a painted silk, or a tapestry from a painting.

What definition can be given of a manufacture, but that derived from its materials and the process by which it is made?

Iron, steel, copper, may all be used for making boilers, but we know them in commerce by their ingredients and process of manufacture. So bar steel and bar iron may be used for bridges or for rails, but they are not of similar description.

The statutes in force in 1862 prescribing a duty on the named delaines, when woven in the gray, furnish one absolute characteristic by which the similarity must be tested. These commercial understandings also point to this "being woven in the gray" as an element common to the whole delaine family, and the gray cloth being printed or dyed in the piece or web as an element common to all dyed or printed delaines.

The very indifference § 9 shows as to whether its delaines are colored or not shows Congress understood the infallibility of this commercial test of similarity, and relied on it either to carry the gray in, or to carry the colored into the clause.

The *use* of delaine fabrics in the gray is to have them printed or dyed, — never are they worn in the gray; the *use* of the printed delaines is generally for wear, but often for furniture purposes, curtains, etc. As their use furnishes no similarity, except that final one of all fabrics being intended for human use, it is to the fabric and its peculiarities we must look to find that quality and speciality which brings cashmere, mousseline, etc., delaines, both in the gray and printed in colors, into the same clause. In common they are woven in the gray. When, therefore, in the clause, Congress says, "on *all* delaines, cashmere delaines," etc., it means all delaines, all cashmere delaines, all mousseline delaines, all barege delaines, whether colored or in the gray.

While the plaintiff was contending for the construction above stated and asked for the instruction No. 1, the defendant contended that the word *all* in the delaines clause exhausted that family of goods, and "the similarity referred to by the expression, 'goods of similar description,' in the Act of 1862, is a similarity in

respect to the product and its adaptation to uses and to its uses, and not merely to the process by which it was produced, and that because if a class of goods were not, in 1862, commercially known as delaines, it does not follow that they were not goods of similar description within the meaning of the statute." The judge erroneously instructed the jury in the above-quoted language. He rejected the commercial understanding as a proof of the intent of the statute. This will be separately considered. He gave the jury an erroneous rule to apply the clause by, which was coupled with several references in his charge to them to find the facts whether delaines were "sold as dress goods for ladies' wear," and whether plaintiff's goods were "an article for ladies' dresses," independent of the differences that were admitted to exist between the fabrics, and then told them that even substantial differences between the articles would not relieve the plaintiff from the exaction unless the jury should also find they were not of similar description *in the uses* the articles could be put to and their adaptation *for use*.

Thus he practically declared all evidence immaterial, except the question whether he *uses* of these goods were similar to those of the delaines, and that "substantial differences," as manufactures, other than in the use to which the article could be applied, were not to be regarded on a question of the similar description of one class of goods to another. Had the statute said, "wearing apparel" or "all women's and children's dress goods," without qualification, then this might be the proper interpretation of such words in such context.

The statute says nothing about uses or adaptation to uses as a test for levying this square yard duty. Neither does it put any duty on any class of articles described as ladies' dress goods. What is a tariff statute but a general description of the articles, either by their commercial name or by their process and material of manufacture?

In *Arthur* v. *Sunfield*, 6 Otto, 128, steel spectacles were within the general words of "manufactures of steel" and of "manufactures of glass," and in the dispute as to which controlled the import, the Court said that, as without glasses the article would scarce be *spectacles*, it thought the glass clause governed the import as its controlling characteristic.

Manufactures "of mixed materials," in part cotton, silk, wool, worsted, etc., may just as well be for ladies' wear as "delaines," and more broadly.

Yet the judge, from his own point of view, substantially leaves the jury to infer that the levying of taxes on articles for ladies' wear which were *substantially different from "the delaines"* was an *exclusive function* in that delaine clause.

I know of no language in the statute which would not justify the like implication of uses as a standard to be added to the "mixed material" clause, or to the bunting clause of that Act, with as much propriety as to the delaine clause. There are exceptional instances

where the *use* of an article enters into the description of the statute. But in every such instance the statute in plain words states and directs that *the use* to which the manufacture or article is to be applied shall form a part of *the description*. In no instance can a clause levying a duty, or a decision of a court on revenue law, be found where *the use* has been held to be a portion of the description identifying the article, unless Congress has first specifically enacted that the use shall be a part of the description. Otherwise *name*, texture, material, fabric, or process of manufacture constitute the elements of description for classification according as Congress indicates. No instance of foisting *uses* "by implication" into a tariff description is known; enactment alone can put them there.

Congress thought this in the tariff of 1862; for when it meant that a similarity of uses should enter into description of articles liable to a particular rate, it said so in words, and did not leave it to implication.

12 Stats. at Large.

Page 547. — Copal, cowrie, damar, and *all gums used for like purposes*.

Page 548. — Petroleum . . . other bituminous substances used for like purposes.

Page 550. — Lastings, mohair cloth, silk, twist, or other manufacture of cloth, woven or made in patterns of such size, shape and form, or cut in such manner as to be fit for shoes, slippers, boots, bootees, gaiters and buttons exclusively, not combined with rubber.

Page 550. — On braids, plaits, trimmings, etc., *used for making* or ornamenting bonnets, hats and hoods, etc.

Page 550. — Acorn, coffee and dandelion root . . . and all other articles *used* or *intended to be used* as coffee, or a substitute for coffee.

Page 550. — Gunpowder, and all explosive substances *used for* mining, blasting, artillery or sporting purposes.

Page 552. — Percussion cups, fulminates, fulminating powders, and all articles used for like purposes, etc.

Page 554. — Cotton bagging, or other manufactures not otherwise provided for, suitable for the *uses* to which cotton bagging is applied, etc.

Page 547. — Paints and painter's colors, dry or ground in oil, and moist water-colors used in the manufacture of paper hangings, colored papers and cards.

Page 549. — Essences, tooth pastes, hair dyes, extracts, etc., used or applied as perfumes, or applications to the hair, mouth or skin.

In the same statute the words "all descriptions," the "like descriptions," "every description," "whatever description," frequently occur.

The enacting clause of each section begins: "There shall be levied on the goods, wares and merchandise herein enumerated."

These terms refer either to the name of the article, the material, or the fabric, and never to the *use* of.

"All descriptions" occurs twelve times.

"Like descriptions" six times.

"Every description" six times.

"All kinds" eight times.

"All other descriptions" three times.

"Whatever description" once.

The word "description" relates to the process once or twice.

"Similar articles" twice. (See p. 556.)

"Similar preparations" (p. 556), once.

"Similar description" once in the case here at issue, and here it is: "Goods of similar description."

This analysis is conclusive that the word "description" in the intent of Congress referred always to the thing in that statute, and where the use of a thing was a criterion of classification, that Congress employed the formula "used for like purposes," "used for," "suitable to the use to which."

(7.) In no instance did it express such a purpose by the phrase "similar description of uses."

12 Stats. at Large, p. 553, has this proviso: "Balmoral skirts, or goods of like description, or used for like purposes, made wholly or, etc." Here is a careful distinction drawn between the force of the words "like description" and "used for like purposes," and in its own opinion Congress was clear the words "like description of goods' carried no inference that it included goods that were used for like purposes.

This Court has rejected the comparison by "uses" as a mode of classing articles under a revenue law.

Curtis v. *Martin*, 3 How. p. 100, Duty on Cotton Bagging.

"It is a settled rule to construe by 'the commercial designation,'" said the Court below, which the Supreme Court affirmed, "and not with reference to the materials of which they may be made, or *the use to which they might be applied*. . . . If it had been the intention of Congress to impose the duty on all articles used for cotton bagging, the language of the Act would have been different, and in terms prospective and adapted to such purpose."

Arthur v. *Camming*, 1 Otto, 363.

"Burlaps": the fact they were suitable for and could be used as oilcloth foundations was, the Court decided, "perfectly immaterial," and the 3 Howard case was cited in point. In the crape-veil case (6 Otto, 111), it is again cited as authority in the same line of construction.

Should the theory of comparing by "uses" escape the preceding

objections, yet in the absence of any rule by Congress, one clause is as much entitled as another to be construed to the utmost latitude of the uses of its subject articles, and the judge failed to apply his doctrine impartially. Three clauses were before the judge, all claimed to be operative and admittedly in force. His task was to point out the governing distinctions. He selected the new delaine clause of 1862 as controlling the two other clauses, which were both of earlier origin and were re-enacted in the same statute.

In 6 Otto, 158, this Court said, "If a revising statute covers the whole subject matter, it virtually repeals the antecedent statutes unless something indicates a contrary intent."

In 6 Otto, 137, *Arthur* v. *Homer*, this Court said, "To repeal a statute by a later one, there must be a positive repugnancy. No implication otherwise arises, neither when it increases nor when it lowers the duty."

In *McCool* v. *Smith*, 1 Black, p. 471, the Court said, "None arises if it be possible to reconcile the two acts of the legislature together." There is no repugnancy in these statute clauses considered by themselves. Actual "delaines," as described in the gray or printed, may be subject to the additional duty; but the bunting clause or the mixed material clause, carrying Saxony dress goods and plaids, cannot be construed into the language of that clause unless you import words Congress did not enact — "used for like purposes" — into the delaine clause, and thus seek to make it cover the whole subject of the other clauses.

The only repugnancy is that which the judge has created by charging that the similarity in "similar description" meant the uses the article could be applied to. Wherever the vague standard of uses applied by implication to classify enumerated manufactures may lead, this Court has heretofore sought precision by insisting on commercial names as the test of distinctions in classification, and has never implied additional words into a clause for the purpose of raising a repugnancy between two clauses of a statute.

The judge did not say the mixed material and bunting clauses of 1862 were void; but when he said the uses delaines might be put to was the lawful standard of the scope of the delaines clause, he gave it a latitude which included not merely all textile manufactures, but even lumber and plastering and wall papers for house building. All are for *human use*. Even manufactures of paper could be included, as the testimony shows delaines *are used for printing*.

Nothing in the statute designates that only one of these uses shall be selected as a standard, nor which of them, if only one.

What is there in the statute which selects "ladies' wear," as the use which is the *criterion* of comparison, or that says he, the judge, may select one use for a test, and ignore all others?

But why did the judge neglect to engraft uses on "mixed mate-

rial" and "bunting" clauses? Their latitudinarian capacity was even greater, for the specific commercial names of the delaines *restricted* the grasp over wool, worsted and mohair fabrics far more than the words "manufacturers of" these materials. If "uses" were subject of test, this omission was error.

The doctrine of this application of the uses to the construction of the clause is the invention of the judge. He had refused to permit the jury to be guided by the mercantile sense, or commercial understanding of similarity of goods, wherein their uses have some relations. He became his own expert, and avowedly told the jury his rules for comparison were not the rules of commerce.

The judge rejected all prayers for the commercial standard of interpretation, and charged the jury that, "In my view, the words 'similar description' are to be taken and understood in their popular and received import as generally understood in the community at large at the time of the passage of the Act."

The judge then proceeds to give the jury rules for examining or applying the similar description to the import, stating wherein the similarity is to be sought for.

1. He does not leave to the jury to find what is the "popular or received import" of these words: he defines them himself to the jury.

> *Law* v. *Cross*, 1 Black, p. 538.
> *Washburn* v. *Gould*, 2 Story, 122.

This is error: it took a question of fact from the jury and decided it himself.

2. The record shows no other testimony than of merchants and manufacturers, professional experts. By his refusal of prayers and his charge he tells the jury to give no weight to their criterions or their distinctions on the question whether the goods are *of similar description*.

A *substantial difference* in the plaintiff's goods from delaines, he charges, does not alone take them out of the statute.

a. "Similar description" he defines (fol. 33) includes the uses and adaptations to use of the product.

He charges (fol. 32), as to the import, on comparison with the named delaines, "but *if they were substantially different, and the plaintiff's goods were not of similar description*, then they were not subject to the additional duty of two cents per square yard, but only five per cent additional duty should have been imposed."

Thus the two things — substantial difference as goods, and no similarity of uses as manufactures — must, in his opinion, combine to support plaintiff's case.

He takes the facts into his own hands. (Folio 28.) He tells the jury the printed and colored delaines were for the most part sold

for ladies' wear. The plaintiff's goods, he says (fol. 28), it is admitted were also a ladies' dress goods (fol. 31), directs them to find whether the plaintiff's are a ladies' dress goods, and then when substantially different from delaines to apply his rule of similar description, and cover them in. The distinctions ladies recognize in the style, purposes, and uses of various textures for wearing apparel, which merchants cater for, and manufacturers exhaust the resources of art to produce (fol. 14), are all disregarded in this arbitrary definition of the popular import of the statute comparison. Neither the popular meaning nor the similarity of uses was really submitted to the jury.

The jury verdict found nothing material in the case. The judge decided that "dress goods" was the delaines' use intended by the statute. He said (fol. 29), the similarity of our goods "in the purpose for which they were made is not very seriously questioned."

REVENUE DESIGNATION.

The fourth prayer of the plaintiff which was refused was, "that in 1862 there was no statute definition of delaines as such, except when woven in the gray; and plaintiff's goods, if woven in colors, are not goods of a similar description."

Collation of the statutes shows it absolutely true that the only statute description of delaines is March 2, 1861, where it says "all delaines, cashmere delaines, barege delaines, *composed* wholly or in part of wool, gray or uncolored, and on *all other gray or uncolored goods of similar description.*" Here gray and uncolored are *descriptive words* of the named delaines; they were continued in the Act of August, 1861. Whether the goods afterwards should be dyed or not, these named delaines have the peculiarity of being originally "woven in the gray."

This Act remained in force and these named delaines *and no others* are those which are *named* by the Act of 1862. As a matter of revenue construction on settled principles follows the rest of the prayer: "The plaintiff's goods, if woven in colors, are not goods of a similar description to the delaines of the statute of 1862." Not to repeat arguments already made, this statute standard feature of "the delaines" is integral (see 5 Otto, p. 146, *Movius* v. *Arthur*); the commercial understanding, as shown in the testimony, agrees with the statute. There may be additional characteristics of various delaines, but if the *description* of the named goods is the *test* for ascertaining similarity under the statute, rather than the *uses* to which the goods may be put in consumption, then the prayer ought to have been granted: its refusal was error.

The "delaines" had surely acquired a revenue character from the process of their manufacture, which ought to have been recognized as an element for construction of the tariff.

THE COMMERCIAL TEST.

Plaintiff's sixth prayer asked the judge to instruct the jury that the phrase "goods of a similar description" referred to the known denominations of trade, and what was known among merchants as of a similar description to the delaines in their prevailing characteristics, and the jury should determine from the evidence whether the plaintiff's goods came within the statute.

The judge refused to give this instruction, and did charge the jury "that the words were to be understood in their popular and received import as generally understood in the community at large at the time of the passage of the Act 1862," and that meaning he said was a similarity in the adaptation of the goods to uses, and to the uses of the goods, and not merely to the process by which it was produced; and "If a class of goods were not in 1862 commercially known as delaines, it does not follow they were not goods of similar description within the meaning of the statute."

The refusal and the instructions given were erroneous.

Arthur v. *Davis*, 6 Otto, 136, construed a clause "braces, etc.," and "composed wholly or in part of India rubber," in reference to an additional duty.

The Court said, "If they are technically and commercially braces and suspenders composed in part of India rubber, they take their dutiable character from that source."

Arthur v. *Unkhart*, 6 Otto, 120, held gloves composed of cotton and silk were not silk gloves, because they were commercially known as "plaited gloves" or "patent gloves," and not as "silk gloves."

Arthur v. *Lahey*, 6 Otto, 112.

Justice Hunt said in the beginning of the opinion of the Court, "We assume at this point as established the following proposition: The commercial designation of an article among traders and importers, where such designation is clearly established, fixes its character for the purpose of the tariff laws. The decree repeats this rule *verbatim*."

Arthur v. *Morrison*, 6 Otto, 110, discusses and establishes the principle. In this "thread lace" case and the "crape veil" case, the Court comments with approbation on the *peculiarities of the process* of manufacture of these articles, which were assigned as the reasons why the merchants distinguish and separate crape and thread lace from silk in their own technology; and the Court in the crape veil case says (p. 110), "It is but reasonable that, like the language of marine policies and the terms of the law merchant, supposed to be especially applicable to this class, these laws should be construed as universally

understood by the importer and trader." It was in precisely this sense plaintiff asked the instruction that the pervading characteristic of a delaine fabric, as it was known among merchants, should be found by the jury; and that plaintiff's goods were not similar unless possessing such pervading characteristic. The Court refused to give that effect to mercantile usage or understanding which this Court has inculcated and respected, and it rigorously charged the jury against receiving any bias from such view, and set up its new statute of uses as a rule of judicial action.

If I understand the principle in the "thread lace," "artificial flowers," "crape veil," cases previously cited, it is that where a commercial name is given as the standard or test for comparison, that comparison is made through or by means of the distinctions which govern in the commercial understanding, unless a contrary rule is indicated. The certain delaines which are, the statute declares, standard are designated by their commercial name.

The comparison should have been whether plaintiff's goods were known in trade as of a similar description. This view is sustained by *Arthur* v. *Cumming*, 1 Otto, 363: "that the descriptive terms applied to articles of commerce shall be understood according to the acceptation given them by commercial men in our own ports at the time of the passage of the Act in which they are found."

See 200 Chests of Tea, 9 Wheat. 439.

The pervading characteristics of the delaines should have been found by the jury and used as the test.

FIFTH PRAYER

Asked that the jury compare the plaintiff's goods with the delaines of the statute, both as to being woven in the gray and the process of weaving in colors; also in regard to their appearance, mode of finish, and capacity to be worn either side out, quality, cost, and non-existence, either woven in the gray or as printed or dyed in the piece goods, and if the differences were *considerable*, then the jury might infer they were not goods of similar description.

This prayer asked the like process of comparison which this Court has applied in construing many statutes (see 6 Otto) to be made in comparing plain, dyed and printed delaines with goods woven in colors.

Such a commercial and manufacturing comparison was made in "thread lace," "crape veils" and other cases.

The judge rejected the prayer and charged in lieu (fol. 33), in substance and effect, that the similarity of uses of the product was the statute similarity, and controlled both the distinctions of process and of commercial understandings, and even the popular import of the words "similar description," whatever that may have been.

There is no similarity between the art of printing and the art of weaving in colors or of embroidery by the needle. The mother of Si-era, we read in the Bible, sat at the window, longing for the sound of the chariot wheels of her son and the prey of needlework of divers colors embroidered on both sides, but knew nothing of printing, and would not have accepted a cheap printed delaine. Nor did this Court, in *Arthur* v. *Homer*, 6 Otto, 138, consider that "embroidery" or "tambouring" (which is a species of weaving) was covered by a clause that said "all linens."

In *Arthur* v. *Moller*, 7 Otto, 366, it strictly defined "printing as distinguished from painting in chromos."

This Court has also looked into process as part of the means to establish the mercantile understanding of the tariff terms in the "thread lace," "crape veil," "lead" cases. (6 Otto, 160.)

The "delaine," when in the market for consumption, if at all figured, is the product of the art of printing in colors. In no case are figured goods, like the plaintiff's, subject to a printing process. The figures are woven in the loom by the use of colored yarns for warp and weft.

The testimony shows that in commerce the process of manufacture is the important test of delaines, beginning with woven in the gray, with uncolored yarns, and going on to the dye-house, the printing-press, and the finishing house. It and the Acts of 1861 and '62 agree that it makes the "delaines" more particularly than the materials of the fibres. It is the peculiarities arising from the process of manufacture which make the commercial names of the plaintiff's goods distinguish them from goods made by the delaine process. (See the Thread Lace Case, 6 Otto.) The testimony shows no goods made by any delaine process ever bear in commerce the names which plaintiff's goods are known by. The produced articles are dissimilar in those qualities — touch, feeling, taste, appearance — which in commerce give fashion, demand and price to goods (fol. 14, 15), and spring from the process of manufacture.

Now when the judge told the jury to weigh what had been urged as to the difference of process, but the similarity in adaptation to use and use of the product was the test, he misled the jury.

For these different errors in the refusals of plaintiff's prayers for instructions, in the charge given to the jury, and in the omissions to charge material matters, the plaintiff submits the judgment below ought to be reversed and the cause remanded.

All which is respectfully submitted.

For Plaintiff in Error,

CHAS. LEVI WOODBURY, *Counsel.*

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

C. F. HOVEY & Co.
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DEFENDANT'S BRIEF.

STATEMENT.

This was an action of assumpsit, to recover back moneys had and received by the defendant, as collector of the port of Boston, assessed as duties upon goods imported by the plaintiffs into the port of Boston in the years 1862 and 1863.

The pleadings are made a part of this bill of exceptions.

The defendant assessed and exacted duties at the rate of 30 per cent. ad valorem, and, in addition, 2 cents per square yard, upon the ground that these goods were goods of similar description to delaines within the ninth section of the act of July 14, 1862, and did not exceed in

value 40 cents per square yard. Plaintiffs duly protested against the exaction of the 2 cents per square yard, and claimed that the goods were only liable to a duty of 30 per cent. ad valorem under the mixed-material clause in the act of March 2, 1861, and of 5 per cent. ad valorem, in addition, under the similar clause in the act of July 14, 1862; and appealed to the Secretary of the Treasury, who affirmed the decision and action of the collector.

And this action was duly instituted for the recovery of the difference between 35 per cent. ad valorem, and 30 per cent. ad valorem, and 2 cents per square yard.

A copy of the protest is hereby annexed and made a part of this bill of exceptions.

It appeared in evidence that all delaines, cashmere delaines, muslin delaines, and barege delaines were woven in the gray or natural color of the wool or worsted and cotton, and afterwards dyed or printed, and were imported and bought and sold in both conditions, and that they were afterwards used for ladies' dresses. It also appeared in evidence that there were other goods, such as challis delaines, Persian delaines, Coburgs, and Armures, which were woven and bought and sold in the gray or natural color of the wool, worsted, or cotton, as well as after being dyed or printed, and afterwards used for ladies' dresses. It also appeared in evidence that some delaines and muslin delaines were all wool or worsted, while other and Cashmere delaines, barege delaines, Challis delaines, Persian delaines, Coburgs, Armures, &c., were made of cotton warp and wool or worsted filling.

It also appeared in evidence that delaines, muslin delaines, barege, &c., were known by the same names

when bought and sold in the gray or uncolored condition as when bought and sold in a printed or colored condition.

It further appeared in evidence that, as early as 1857, both the all-wool delaines and those with cotton warp and wool or worsted filling were known in trade, the better class by the above names, which from time to time were changed to suit the fancy of importers and purchasers.

It further appeared in evidence the plaintiffs' goods in question were known in trade and among manufacturers and bought and sold as Poil de Chêvres, Reps, Plaids, Lustres, Saxony dress goods, &c., and were never woven in the gray or natural color of the wool or worsted or cotton, but were always woven in colors, by the yarns being dyed or colored before weaving, and that they never existed in a gray or uncolored condition.

It further appeared in evidence that the machinery used in the manufacture of the various kinds of delaines could not be used without some alterations in the manufacture of the plaintiffs' goods when they were of more than one color, and that the machinery by which the designs were printed on delaines were not used at all in the manufacture of Saxony dress-goods, the designs and surfaces of the latter being made by the art of weaving colored yarns into a fabric.

It also appeared in evidence that in England the printing or dyeing of delaines was always done at printworks, and at a different manufactory, after the goods had left the weavers.

There was also evidence tending to show that the plaintiffs' goods in question were usually of greater

value than delaines, delaines varying in price from 12 to 25 cents and Saxony dress-goods varying from 14 to 35 cents per yard, and also to show that they presented a different appearance to the eye both in piece and when made up, and were of greater weight.

It was also shown in evidence that goods alike with those of plaintiffs in question were classified by the customs officers under the act of March 2, 1861, under section 22 in the mixed-material clause, until said act was amended by the act of August, 1861, substituting the word worsted for wool.

It also appeared in evidence that the plaintiffs' goods, from being woven of dyed yarns, presented two finished surfaces, both in figured, twilled, and plain goods, while the delaines printed after being woven were finished on one side only; but delaines dyed in piece of one color likewise had two sides uniform.

It was contended in behalf of the defendant, and there was evidence tending to show, that all fabrics for women's dresses of cotton warp and wool or worsted filling, woven in the gray, and afterwards stained, colored, or printed, for women's dress goods, were known as delaines at the time of the passage of the acts of Congress relating to the question at issue, and that Challis delaines, Persian delaines, Coburgs, Armures, &c., falling within said definitions, were then known in commerce as delaines.

The defendant further claimed, and introduced evi dence tending to show, that the plaintiffs' goods in controversy were of cotton warp and wool or worsted filling, and had the same general characteristics as delaines, not only in the materials of which they were made, but in texture, quality, and adaptation to the same uses, and that they were in fact used for the same purposes.

The plaintiffs introduced evidence tending to show that Challis delaines, Persian delaines, Coburgs, and Armures were not, at the time of the passage of said acts, commercially known by the name of delaines (the two former being sometimes abbreviated into Challis and Persians), and contended that they were the goods of similar description to delaines referred to in the statute.

The defendant having introduced evidence tending to show that Challis delaines, Persian delaines, Coburgs, and Armures, at the time of the passage of said acts, were known as delaines, contended that they were included in the words of the statute "all delaines," and that the goods of similar description referred to therein must be goods other than Challis, Persians, Coburgs, Armures, or any other delaines.

Plaintiffs requested the court to rule as follows:

1st. That the ninth section of the act of 1862, "on all delaines, cashmere delaines, muslin delaines, barège delaines, composed wholly or in part of worsted, wool, mohair, or goat's hair, and on all goods of similar description, not exceeding in value 40 cents per square yard, 2 cents per square yard," considered in connection with the thirteenth section of the act of 1861, to which it is additional, applies to goods woven in the gray, whether subsequently colored, printed, stained, or left in the gray, and is not applicable to goods woven in colors with yarn-dyed warps or fillings; and if the jury believe from the evidence that the plaintiff's goods were not woven in the gray or natural color of the worsted and cotton, but were woven with colored warps, or fillings, then their verdict must be for the plaintiffs.

2d. That if the jury shall find that these goods were manufactured of mixed materials, and were not manu-

factures possessing the peculiarities which distinguish delaines from other manufactures of wool and cotton, then, under the act March 2, 1861, such goods were classified and came within the mixed-material clause in section 22 of the act of March 2, 1861: That neither the act of August 5, 1861, or that of July 14, 1862, operated to take them out of that clause, and they so remained in the corresponding clause of 1862.

3d. That the third subdivision of section 13 of the act of March 2, 1861, when construed with the rest of the wool clause of the same section, cannot be consistently construed to include under the clause "all other gray or uncolored goods of similar description" any goods made in part of wool which are not similar to delaines in those peculiarities which give to the enumerated delaines their distinctions from other manufactures made wholly or in part of wool in the gray; and also that portion of the third subdivision, beginning after bunting, in order to be consistently construed with the second wool clause in the subdivision of the same section, the words "stained, colored, and printed" must be limited to the delaines in the gray composed wholly or in part of wool in the preceding portion of the third subdivision when altered by being stained, colored, or printed.

In section 9 of the act of July 14, 1862, the delaine clause, when construed with the rest of the wool clauses in the same section, the words "all goods of similar description" cannot be consistently construed to include any goods made wholly or in part of wool which are not similar to delaines in those peculiarities which separate delaines from other goods woven in the gray composed wholly or in part of wool; that the bunting clause

in the third subdivision of section 13 of the act of March, 1861, as amended by the act of August 5, 1861, and converted into a worsted clause, separated all stained, colored, or printed manufactures, of which worsted is a component material, from delaines in the gray by words referring to component material, in contradistinction to any names which the manufactures might bear in commerce; and that the additional act of 1862, section 9, provided for this same class, described by their component material, an additional duty; and that in the delaine class previously described in the same section as a class, whether composed of worsted or wool, or of mohair, or of goat's hair, the words "goods of a similar description" should not be construed to supersede the specific worsted clause following it, except so far as the goods referred to shall not only be composed wholly or in part of worsted, but shall also have the characteristics and other peculiarities which distinguish the various delaines named as the criterion for the test of similar descriptions.

4th. In 1862 there was no statute definition of delaine as such, except when woven in the gray or uncolored; and the plaintiffs' goods, if woven in colors, are not goods of similar description to the delaines of the statute of 1862.

5th. The words "similar description" in the delaine clause of the tariff act, 1862, refer to such goods as have the greatest number of characteristics in common with delaines; and it is competent for the jury to regard the being woven in the gray or uncolored worsted, to which class these words were limited in the tariff act of 1861. As the first and chief criterion for the comparison, and in applying these words to goods having colored designs or figures upon them, it is competent for the jury to demand that the colored designs or figures should be pro-

duced by a similar process as produced in the manufacture of delaines; and if the colored designs or figures on delaines are always produced by printing or staining after the cloth is manufactured in the gray, and the designs or figures upon the cloths in question were all produced in the loom by the act of weaving colored yarns, then it is competent for the jury to say that the cloths are not goods of similar description; and if the goods on which these duties were assessed differ from delaines considerably in the process of manufacture, or in weaving, or in the process of dressing and preparing the surface, or in the quality and cost, or in the capacity to be worn either side out, or in their appearance, or in touch, feeling, or adaptation to peculiar tastes of customers, or in being ready colored for the market, as dress-goods, when they leave the loom, without going to print or dye-works, then the jury are authorized to find that they are not goods of similar description with delaines.

6th. Revenue laws designate and class substances according to the general usage and known denominations of trade. The words "all goods of similar description," in the tariff act of 1862, refer to a similarity, for revenue purposes, with the goods previously enumerated, and this is determined by what was then generally known and classed among merchants as similar goods; and if being woven in the gray or natural color of the worsted and other materials of which they were composed is found to have been an important and pervading characteristic commonly distinguishing goods known among merchants as of similar description with delaines, then the goods on which the duties in this case were assessed were not of similar description with delaines, unless the jury find they were so woven in the gray or natural color; and,

unless these goods possessed all the pervading characteristics which in 1862 were commonly understood among merchants as distinguishing goods known in commerce as of a similar description with delaines from all other goods, the plaintiffs are entitled to a verdict.

The court refused each of said instructions as called for by the plaintiffs, and did instruct the jury that said prayers, so far as the act of 1861 was in question, were not important; as, however that act might be construed, the plaintiffs' goods were liable to a duty of 30 per cent. ad valorem under that act, which they did not contest.

The court further instructed the jury as follows:

In the act of 1861 we find various provisions applicable to worsted goods, applicable to delaines, applicable to mixed goods. I have been asked in the requests here, on the one side and the other, to declare to you the various qualifications and legal effect of those clauses which are found in the act of 1861. I decline to give you any of those instructions or to instruct you in regard to the law of 1861; and further than this, that I say to you that under the law of 1861, as amended by the act of August, 1861, these goods, if they had been then imported, would have been subject to a duty of 30 per cent. ad valorem, but under which clause in the law they might come so far as the determination of this case is concerned, it is not important for me to instruct you.

But it has become important that I should say to you, and I do say to you, that under the law of 1861 the defendant was justified (whichever clause the goods came within) in demanding a rate of duty 30 per cent. ad valorem, so that, so far as that particular demand is concerned, of a duty of 30 per cent. ad valorem, it is admitted. I suppose that the defendant was justified in demanding it under the law of 1861. The law of 1862 is the one under which the collector demanded an additional rate of 2 cents per square yard.

It is not contended that these goods are not included

in the act, but it is claimed by the parties plaintiff that under that act the additional rate of duty was 5 per cent. ad valorem, and not 2 cents per square yard. And although it may seem that it would make very little difference whether the duty were 5 per cent. ad valorem or 2 cents a square yard, yet it appears that the difference, even to these gentlemen engaged in this business, amounts to a considerable sum. The question is not, therefore, what was the rate of duty imposed on these goods under the law of 1861, but it is what was the additional rate of duty to which these goods were subject under the law of 1862, whether it was 2 cents per square yard or 5 per cent. ad valorem. There are various clauses of the statute of 1862 which may be considered as bearing upon the question, and the first one reads as follows:

"On all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of worsted, wool, mohair, or goat's hair, and on all goods of similar description, not exceeding in value 40 cents per square yard, 2 cents per square yard."

That is the clause which the government claims was applicable to this class of goods. There are two other clauses in this act under which the plaintiffs claim that these goods may be brought; that although in common language they are described as delaine goods, they did not come under the delaines clause, as it is called; but it was under one of the other clauses that the duties should have been imposed. Those two clauses are as follows:

"On bunting, worsted yarns, and all other manufactures of worsted, or of which worsted shall be a component material, not otherwise provided for, 5 per cent. ad valorem."

And then, secondly, it is declared that on all manufactures not otherwise provided for, composed of mixed materials in part of cotton, silk, wool, hemp, jute, or flax, a duty of 5 per cent. ad valorem shall be imposed.

Now, gentlemen, I propose to tell you what I understand the delaine clause in the act of 1862 to mean; and

so far as that particular point is concerned I shall give you the instructions as requested by the government, that the delaine clause in the act of July, 1862, on all delaines, muslin delaines, barege delaines, &c., imposed a specific duty on all delaines, whether colored or uncolored, and all goods of similar description to delaines, whether colored or uncolored, if such delaines or goods of similar description do not exceed in value 40 cents a square yard. And the context of the act shows that this specific duty is additional to the ad valorem duty imposed by the act of March 2, 1861, as amended by the act referred to of August, 1861; so that, in determining the question which you have to pass upon, you will determine whether the goods in question are similar in description to these delaines, whether they are colored or uncolored.

Now, what I have to say upon this matter I propose to say very briefly, and I have written down what I shall say so that there may be no question, and I shall give you nothing more than what I have written here in regard to it.

This issue must be determined under the instructions which you may receive from the court, and you are bound to take into consideration all the evidence bearing upon the question of what kind of goods were the delaines mentioned in the act of Congress, and whether the plaintiffs' goods, upon which the 2 cents per square yard were exacted, were or not of a similar description. These words are to be taken and understood in their popular and received import as generally understood in the community at large at the time of the passage of the act. There is one request made by the plaintiffs here that I should say that they are to be taken in the sense used by merchants; the request is substantially that these words of "similar description," I say to you, in my view, are to be taken and understood in their popular and received import, as generally understood in the community at large at the time of the passage of the act.

As I understand the testimony, there were in 1862 two descriptions of delaines; one of all wool or worsted

(and it is not claimed that the goods upon which these duties were exacted were of all wool or worsted); the other of cotton warp and worsted filling, and known in commerce by various names; some of which, as "cashmere barege," are enumerated in the act. These goods were invariably woven of undyed yarn, or, as it has generally been described, woven in the gray. The goods for the most part were dyed, or printed, or colored, and afterwards sold as dress-goods for ladies' wear. It would seem from the evidence that they varied somewhat in texture, in coarseness or fineness of the worsted, and sometimes, as some of the witnesses state, were twilled or woven in figures, and sometimes the warp had more or less heavy threads or cords running through it for the making of goods known as "reps," but the filling, it is said, was never in color when woven.

Here is found, if I am correct in my view of the evidence, of which the jury will judge, a class of dress-goods of cotton and worsted filling without color of any kind when woven, but the color was subsequently applied, and those were the delaines referred to in the act, as I understand it.

Now, what were the plaintiffs' goods? because, in order to authorize the imposition of a duty of 2 cents per square yard, they must be goods of "similar description" with the classes of delaines that are enumerated in that section.

The goods of the plaintiffs, as I understand the testimony, upon which the duty of 2 cents per square yard was exacted, it is admitted were also a ladies' dress-goods of cotton warp and worsted filling, and it is therefore claimed, on behalf of the government, that the two kinds of goods are of a similar description. In the matter of the material used in their manufacture, and of the purposes for which they are made, I do not understand that their similarity is very seriously questioned. But the plaintiffs claim that in other material important respects which enter into the very article itself they are substantially different. It is said (and about that I believe there is no dispute) that while the filling

of the plaintiffs' goods is of worsted, it is never at the time of weaving plain uncolored yarn, but is dyed either in the wool or yarn before weaving. And it is claimed by the plaintiffs that by using such a colored yarn instead of plain yarn a fabric entirely different from a delaine is the result.

It is also claimed by plaintiffs that this weaving of colored yarns requires changes in the looms, rendering the process more complicated. And, also, that the cost of manufacture of the plaintiffs' goods is greater, and thereby they are more expensive to the consumer.

It is also claimed by the plaintiffs that delaines are faced or finished on one side only of the fabric, and that the goods of the plaintiffs on each side are substantially alike, with finished faces, so that thereby a more useful and desirable article is produced, as the same, when partially worn, may be made over and turned for further use, if the wearer so desires. It is also said, I believe, by one or more of the witnesses, that goods such as plaintiffs imported require a larger or better article of worsted than the delaine fabrics. I think a single witness testified as to that. Whether these differences do or do not exist, and to what extent, and how far the cloth thus produced is or not thereby a different fabric, are all matters for the careful consideration and determination of the jury.

If you find that the product or result is an article for ladies' dresses made with a cotton warp and worsted filling, the question for your determination is, whether the two kinds of goods are substantially the same and alike. The process of manufacture, the worsted in the goods of the plaintiffs being dyed previous to weaving, is an element to be considered by the jury in coming to their conclusion, but not alone and distinct from all others which may have been established.

It is for the jury to determine, from all the evidence in the case, whether, by the colored filling made and woven in the way and manner described, with a cotton warp, the product is or not an article substantially similar and like the delaine fabrics; whether or not, while

varying more or less in some particulars from delaines, the goods were or not substantially the same or substantially different from them. If substantially the same article, then the duties were properly assessed; but if they were substantially different, and the plaintiffs' goods were not of a similar description to the delaine fabrics, then they were not subject to the additional duty of two cents per square yard, but only to an additional duty of five per cent. ad valorem, under the act of 1862; and the difference in that case the plaintiffs should be entitled to recover, with interest from the date of the writ. So that it is not one element only you are to consider, but you are to take into consideration all the elements.

You will consider the point which is dwelt upon with so much strength and force by the learned counsel for the plaintiffs, of one article being made of plain wool and the other being made of dyed wool with a different fabric as the result, and say whether these two goods are substantially the same or substantially different; but every element is to be considered and not one alone.

I have been asked to give you certain instructions by the plaintiffs. So far as those instructions are covered by what I have said, you will conform to them. Most of them relate to the act of 1861, and to the operation of that act. I have said to you, as I say again, that, so far as the act of 1861 is concerned, all we have to do with that for the purposes of this trial is to find out what were the duties in the act of 1861, and not particularly into which class of goods these fell. That I do tell you, and that is all you need require from me, that under the act of 1861 the goods were subject to a duty of 30 per cent.

The eleventh prayer of the defendant, which was as follows, was given by the court:

The instruction I give you, as requested, that the similarity referred to by the expression "goods of similar description" in the act of 1862, is a similarity in respect to the product and its adaptation to uses and to its uses,

and not merely to the process by which it was produced, and that because, if a class of goods were not in 1862 commercially known as delaines, it does not follow that they were not goods of "similar description" within the meaning of the statute.

To the above rulings and refusals to rule the plaintiffs except, and pray that their exceptions may be allowed; and, the same being found conformable to the facts, are allowed and sealed, and ordered to be filed as of the 15th day of June, 1875, before the jury left bar.

STATUTES.

The phraseology relied upon by each party is below quoted from the several statutes mentioned in the exceptions.

The act of March 2, 1861, c. 68, sec 13, item third, says the duty after April 1, 1861, shall be "on all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of wool, gray or uncolored, and on all other gray or uncolored goods of similar description, 25 per cent. ad valorem; on bunting, and on all [*sic*] stained, colored, or printed, and on all other manufactures of wool, or of which wool shall be a component material, not otherwise provided for, 30 per cent. ad valorem." (12 Stats., 185.)

In section 22 of the same act occurs this language: "Manufactures, not otherwise provided for, composed of mixed materials, in part of cotton, silk, wool, worsted, or flax," * * * 30 per cent. ad valorem." (12 Stats., 192, middle.)

The act of August 5, 1861, c. 45, sec. 6, amended article third of sec. 13 of the act of March 2, 1861, by striking out "wool" and inserting "worsted." (12 Stats., 294, middle.)

The act of July 14, 1862, c. 163, sec. 9, adds a further duty—

"On all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of worsted, wool, mohair, or goat's hair, and on all goods of similar description, not exceeding in value forty cents per square yard, two cents per square yard; on bunting, worsted yarns, and on all other manufactures of worsted, or of which worsted shall be a component material, not otherwise provided for, 5 per cent. ad valorem." (12 Stats., 553.)

In sec. 13 of this act it is provided that "manufactures not otherwise provided for, composed of mixed materials, in part of cotton, silk, wool or worsted, hemp, jute, or flax" shall pay the additional duty of 5 per cent. ad. valorem, to the duty imposed by existing law. (12 Stats., 557, near the top.)

BRIEF.

I.

I shall follow the example of Judge Fox in saying it is immaterial to consider under which clause of the act of March 2, 1861, these importations were dutiable, since under any and all that could possibly be supposed applicable the rate is the same; *i. e.*, 30 per cent. ad valorem. The propriety of this part of the assessment is admitted in the protest. The only inquiry there and now made is whether the additional duty imposed by the act of July 14, 1862—the effect of that act, in making *some* increase not being denied—was 5 per cent. (as claimed by plaintiffs) or 2 cents per square yard, as collected by the defendant.

The argument of the plaintiffs was that because the process of making up these goods and applying the dye to the material differed from that employed in the manufacture of the enumerated delaines, and because a lighter or heavier thread might sometimes be introduced, these importations were not "of a similar description" to the articles mentioned in the act of July 14, 1862, sec. 9, above quoted. Certainly the same manner of making the article is not essential; nor that the result should be precisely the same. If, as plaintiffs seem to assume, the methods of manufacture and the product of the loom must both be precisely alike, then the articles would be *identical* and not *similar*—"of a similar description."

Nullum simile est idem. As "all" delaines are specially mentioned, the goods dutiable as "similar" thereto must be something not commercially known as a delaine.

II.

Whether goods are "of similar description" or not—the question of similarity or dissimilarty—is matter of *fact* for the jury.

Thus a jury may look to see whether or not a bastard resembles the putative father. (Finnegan *v.* Dugan, 14 Allen, 197.) Such likeness may be found, though a difference were perceivable in each separate feature. So the jury determine frequently whether or not a signature is forged or genuine from its similarity or unlikeness to one admitted to be authentic, after hours are consumed by experts in pointing out the points of difference or resemblance. (Moore *v.* United States, 91 U. S., 270–4; Moody *v.* Rowell, 17 Pick., 495–7; Hicks *v.* Person, 19 Ohio, 426, and other cases cited by me in 91 U. S., 272.) So in West *v.* State (2 Zabr., 237–8), the identity of a deed was left to the jury upon other testimony than that of handwriting.

The question is purely one of fact. All the testimony adduced by the parties and recited in the exceptions was properly introduced for the purpose of aiding the jury to decide the question of similarity or dissimilarity; but, after that decision has been made, it cannot be reversed or impeached here.

III.

In addition to the remark of Judge Fox, that the words "similar description" were "to be taken and understood

in their popular and received import as generally understood in the community at large at the time of the passage of the act," (Record, 9, folio 27), it may be observed that the exceptions will be searched in vain for any support to the idea that these words then had any technical force as a commercial designation; or that, if so, these goods were not thus designated. So this exception is immaterial, and the plaintiffs could not be injured or aggrieved thereby.

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